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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

PAUL B. HEILBRUNN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
PAMELA A. WILK
LAW OFFICES OF ALAN ELLIS
50 Rittenhouse Place
Ardmore, PA 19003
(610) 658-2255

Attorneys for Petitioner

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QUESTION PRESENTED

Where neither party has appealed, does the Double Jeopardy Clause protect a defendant against entry of a criminal forfeiture a year after imposition of the judgment containing the other aspects of his federal drug sentence, including imprisonment and special assessments?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Paul B. Heilbrunn and the United States).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PAUL B. HEILBRUNN respectfully petitions this Court for a writ of certiorari to review the final Order of the United States Court of Appeals for the Seventh Circuit denying a certificate of appealability, which was filed and entered on August 21, 1998.

OPINIONS BELOW

The Order of the Court of Appeals (per Cummings & Evans, JJ.), denying a certificate of appealability, is attached as Appendix A. This order is not published. The district court's unpublished "Entry" (a memorandum opinion) and Judgment denying the motion to vacate conviction and sentence under 28 U.S.C. § 2255 are attached as Appendix B. The district court's Order denying Mr. Heilbrunn's motion for limited reconsideration of the Entry denying his § 2255 motion is attached as Appendix C. The district court Entry denying a certificate of appealability is Appendix D.

JURISDICTION

The final Order of the United States Court of Appeals for the Seventh Circuit denying a certificate of appealability was filed and entered on August 21, 1998. Appendix A. On November 5, 1998, under No. A-375, Justice Stevens granted petitioner's application for an extension of time to file this petition to and including January 18, 1999. This petition is timely filed on January 19, 1999, because January 18, 1999, is a federal legal

holiday (Birthday of Rev. Martin Luther King, Jr.). Rules 13.1, 13.3, 13.5, 30.1 (1997 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). See Hohn v. United States, 524 U.S. --, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL PROVISION, FEDERAL STATUTE, AND RULE INVOLVED

The Controlled Substances Act provides, in pertinent part:

> (a) **Property subject to criminal forfeiture**
>
> * * * *
>
> The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. ...

21 U.S.C. § 853.

In 1991, at the time of petitioner's sentencing, Rule 32 of the Federal Rules of Criminal Procedure provided, in pertinent part, as applied to offenses committed prior to November 1, 1987:

> (b) **Judgment.**
>
> * * * *
>
> (2) **Criminal Forfeiture.** When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize

the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

In 1996, Fed.R.Crim.P. 32 was clarified to read:

(d) **Judgment.**

* * * *

(2) **Criminal Forfeiture.** If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order .... At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

Fed.R.Crim.P. 32.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ....

STATEMENT OF THE CASE

This petition presents an issue that arose from petitioner's guilty plea, sentencing and subsequent criminal forfeiture based upon federal marijuana distribution-related offenses.

a. Procedural History

The petitioner, Paul B. Heilbrunn, was charged on November 20, 1987, by a special grand jury in the Southern District of Indiana, in 26 counts of a 53-count indictment naming 33 co-defendants. The indictment alleged various marijuana distribution-related offenses. Count 1 charged conspiracy, between a date prior to September 1975 and "up to and including the date of this indictment," which was November 20, 1987, to possess with intent to distribute and to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count 2 charged conspiracy from before September 1975, until at least November 1985, to import marijuana, in violation of 21 U.S.C. §§ 952 and 963. Count 11 charged Continuing Criminal Enterprise (CCE), in violation of id. § 848, and contained the indictment's only allegation of forfeiture, pursuant to id. § 853. Counts 3 and 4 charged possession with intent to distribute marijuana, in violation of id. § 841(a)(1), while Counts 15, 17, 18, 19, 23, 25, 26, 29, 32, and 33 charged violations of the Travel Act, 18 U.S.C. § 1952.[1]

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[1] Although petitioner Heilbrunn was charged in some of the remaining counts 34 through 53, under the international-law "rule of specialty," codified in the treaty under which his extradition was secured, he was not subject to trial or penalty on these counts, as his extradition was not sought or granted on those charges.

Petitioner pleaded guilty to six counts including the CCE on April 16, 1991, pursuant to a written plea agreement. In the plea agreement, the government promised, inter alia, that "[c]onditioned upon such full disclosure [of his assets], the United States of America agrees not to seek the seizure/forfeiture of any of Paul B. Heilbrunn's assets, pursuant to Title 21, United States Code, Sections 853 and 881, other than those specifically delineated in a document entitled Final Plea Addendum Concerning Forfeitures, which will be presented to the Court at the time of sentencing and is to be considered a part of this Final Plea Agreement." Final Plea Agmt. ¶8, at 7-8.[2]

Petitioner was sentenced on July 2, 1991, under the law existing prior to the enactment of the Sentencing Reform Act (SRA) and federal sentencing guidelines, to serve a nonparolable sentence of 24 years for CCE on Count 11, concurrent with sentences aggregating 28 years' imprisonment (parolable after one third [i.e., 9 years, 4 months], pursuant to former 18 U.S.C. § 4205(a)) on Counts 3, 4, 17, 23 and 32. No final addendum respecting forfeitures was presented by the government at the time of sentencing, however. The prosecutor explained only that this deviation from the plea agreement was due "in part" to the death of the father of a government agent who would have been involved with the forfeiture. The prosecutor asked the district court to delay entry of the final judgment until the forfeiture addendum could be added, pursuant to Fed.R.Crim.P. 32(b)(2). Defense counsel remained silent.

[2] Section 881 of title 21, referred to in the agreement along with the criminal forfeiture statute, is the federal drug law provision for civil, in rem forfeitures.

Entry of Judgment was delayed for approximately three weeks; however, the government did not file the promised Addendum within that period. On July 24, 1991, judgment was entered without the forfeiture addendum's having been finalized. In fact, the forfeiture agreement was not submitted until ten months after sentencing (on May 7, 1992), and the final Order of forfeiture was not entered until two months after that, on July 2, 1992, exactly one year after imposition of sentence.[3] No amended judgment containing the forfeiture penalty was ever filed.

No direct appeal was taken.[4] On April 21, 1997, Mr. Heilbrunn filed a motion under 28 U.S.C. § 2255 to vacate his conviction and sentence. The motion alleged, inter alia, that the postponed criminal forfeiture violated his rights under the Due Process and and Double Jeopardy Clauses.[5]

On December 31, 1997, the district court denied the defendant's motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255, in a five-page

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[3] The delay after sentencing apparently was due first to the unavailability of a government-selected polygrapher, and subsequently to time occupied in polygraph examinations of Paul Heilbrunn. The plea agreement, however, did not condition the government's agreement to present the final forfeiture agreement at the time of sentencing on the completion of polygraphy.

[4] Nor had petitioner Heilbrunn been notified by the court at sentencing of his right to appeal. Cf. Peguero v. United States, No. 97-9217 (U.S., pending argument).

[5] The Due Process aspect of petitioner's forfeiture-related claim is not being pursued in this Court.

Entry and Judgment. Appx. B. In denying § 2255 relief on petitioner's forfeiture-related claim, the district court did not specifically and separately address the claim's two different constitutional aspects, but rather ruled that "though separated in time, the forfeiture was part of the same proceeding and was merely one aspect in which the plea agreement was fulfilled." Appx. B6 (Entry ¶ 8, at 4). Petitioner's Motion for Limited Reconsideration pursuant to Fed.R.Civ.P. 59(e), pointing out that in fact no "amended judgment of conviction" reflecting the forfeiture was ever filed, was denied by district court Order entered January 22, 1998. Appx. C.

On March 23, 1998, defendant Heilbrunn filed a timely notice of appeal. The district court denied a certificate of appealability on May 5, 1998, Appx. D, and a two-judge panel of the Court of Appeals denied a certificate of appealability on August 21, 1998. Appx. A.

Petitioner has been incarcerated since May 24, 1989, and is now serving his sentence.

b. Statement of Facts

Between 1975 and late 1987, petitioner Paul Heilbrunn was one of the principals in a large scale marijuana distribution enterprise which was based in part in Indianapolis, Indiana, and had facets in certain southern states and in Michigan. The primary function of the Indianapolis portion was organizing the transportation of marijuana from the place of importation to warehouses in Indiana and Michigan.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The district court's jurisdiction was properly invoked in this case under 28 U.S.C. § 2255, in that the petitioner at the time of filing was (and is) in custody

pursuant to the judgment of a United States court, and filed a motion to vacate his conviction or sentence on the basis that they were imposed in violation of the Constitution and laws of the United States. Jurisdiction over the underlying criminal case rested upon 18 U.S.C. § 3231.

The jurisdiction of the court below rested upon 28 U.S.C. §§ 1291 and 2253(a) and was timely invoked by Notice of Appeal filed on March 23, 1998, from the district court's final judgment entered December 31, 1997, denying and dismissing with prejudice his motion under 28 U.S.C. § 2255, and from the Order dated January 21 and entered January 22, 1998, denying petitioner's timely motion for limited reconsideration of the December 31, 1997, Judgment.[6] The notice of appeal was timely because it was filed within 60 days after entry of the order disposing of the timely motion for reconsideration. See Fed.R.App.P. 4(a)(1), (4)(c); Fed.R.Gov. §2255 Proc. 11.

[6] The motion for reconsideration was timely because it was filed on January 15, 1998, within 10 days, excluding weekends and legal holidays, of the entry of the Judgment denying petitioner's § 2255 motion. Fed.R.Civ.P. 6(a), 59(e).

REASONS FOR GRANTING THE WRIT

This case presents an important and unresolved aspect of Double Jeopardy jurisprudence: what constitutes a "separate proceeding" such that a court may not add even a statutorily-authorized additional form of punishment after the original sentencing has been reduced to a final judgment.

Petitioner Paul Heilbrunn's written plea agreement with the government expressly ensured that no property would be forfeited unless so ordered at the time of sentencing. Yet the forfeiture agreement was not even submitted to the district judge until ten months after sentencing, by which time the judgment had long since become final, neither party having appealed. The Final Order of Forfeiture was not entered until a full year after imposition of sentence, did not occur in the defendant's presence, and was not made part of the judgment.[7]

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[7] Paragraph 8 of the district court's Entry (Appx. B), which rejects movant's claim that his forfeiture violated the Double Jeopardy Clause, contains a factual error which may have influenced the court's determination of the issue. The paragraph states that an amended judgment of conviction was entered when the forfeiture of Mr. Heilbrunn's assets was finalized. Appx. B6 (Entry ¶8, at 4). This is incorrect.

There was an amended judgment filed on May 3, 1994, reflecting changes to petitioner's post-confinement supervision term and special assessments sought by him and granted by the district court in proceedings under former Fed.R.Crim.P. 35. But this much later amended judgment, like the original judgment, did not contain any reference to a forfeiture penalty. No amended judgment containing the forfeiture was ever filed.

Because this case presents the important and unresolved issue of what constitutes a "separate proceeding," such that a person will be deemed to have been sentenced "twice" for the same offense under this Court's Double Jeopardy jurisprudence even though all forms of punishment imposed are legislatively authorized, certiorari should be granted.

Contrary to the district court's opinion, Appx. B, upheld by the court of appeals, Appx. A, the subsequent criminal forfeiture constituted a "separate proceeding" for double jeopardy purposes. The district court ruled:

> 8. The plea agreement entered into between Heilbrunn and the United States contemplated the forfeiture of certain of Heilbrunn's assets. The particulars of this forfeiture were not established and acted on by the court until several months after the sentencing. At that time, however, an amended judgment of conviction was entered. Heilbrunn's argument that the post-sentencing forfeiture violated the constitutional prohibition against double

_____(cont'd)

It appears that the district court's determination of Petitioner's Double Jeopardy claim was affected by this misapprehension of fact. Mr. Heilbrunn sought reconsideration of this claim by the district court on this basis; however, reconsideration was denied. Even if there had been an amended judgment filed at the time of the belated finalization of the forfeiture, however, a whole year after the initial judgment and commitment, this would not have avoided the Double Jeopardy violation. The court would have been without authority or jurisdiction to so amend the judgment at that time.

> jeopardy is without merit because, though separated in time, the forfeiture was part of the same proceeding and was merely one aspect in which the plea agreement was fulfilled. Heilbrunn knew without doubt that the forfeiture would be finalized, and nothing more than that occurred.

Appx. B6. The court of appeals, like the district court, refused a certificate of appealability. Appx. A, D.

Under this Court's precedent as well as applicable statutes and rules, the criminal proceeding had ended when judgment was entered. Because the criminal forfeiture against petitioner Heilbrunn was not only imposed in a separate proceeding but also was contrary to his legitimate expectation of finality in his sentence, it violated his rights under the Double Jeopardy Clause, and should have been vacated when challenged on collateral attack.

The Fifth Amendment provides that no one may "be subject for the same offence to be twice put in jeopardy of life or limb." As the Court has long held, the Double Jeopardy Clause affords various forms of protection against the government's placing a person at risk of punishment more than once for the same offense. Thus, the Clause protects not only against further prosecution for the same offense after acquittal or conviction, but also directly against multiple punishments for the same offense if not imposed at one time. Witte v. United States, 515 U.S. 389, 132 L.Ed.2d 351, 361 (1995) (and cases cited). The imposition of multiple forms of punishment for the same offense in a single proceeding does not offend the Double Jeopardy Clause if the total punishment did not exceed that authorized by the legislature.

Missouri v. Hunter, 459 U.S. 359, 367-68 (1983); Whalen v. United States, 445 U.S. 684, 691-92 (1980).

As stated most recently in the Chief Justice's majority opinion in Hudson v. United States, 522 U.S. 93, 139 L.Ed.2d 450 (1997): "The Clause protects only against the imposition of multiple criminal punishments for the same offense, ... and then only when such occurs in successive proceedings ...." 139 L.Ed.2d at 458-59. In the face of direct challenge from Justices Scalia and Thomas, the Court has thus strongly and repeatedly reaffirmed the traditional view, that the district court is prohibited under the Double Jeopardy Clause from increasing a defendant's sentence in a separate proceeding even if there has been no second prosecution.[8] All the Members of this Court seem to agree, however, that when the defendant has a reasonable expectation that his sentence as originally imposed has become final, the Double Jeopardy Clause protects against any adverse change in the sentence.

Thus has been carried forward to this day the insight of the Court 125 years ago that:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. [T]here has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same

[8] See Hudson, 139 L.Ed.2d at 463 (dissenting opinion); Witte, 132 L.Ed.2d at 368-69 (Scalia & Thomas, JJ., dissenting); Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 802-03 (1994) (Scalia & Thomas, JJ., dissenting).

court, on the same facts, for the same statutory offence.

* * * *

... The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial.

* * * *

For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial has been had, and on a second conviction a second punishment inflicted?

> The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.

Ex parte Lange, 85 U.S. (18 Wall.) 163, 168, 169, 173 (1874). While the broadest language of Lange was limited somewhat by Jones v. Thomas, 491 U.S. 376, 385-86 (1989), its fundamental principles remain sound, and lie at the root of this Court's double jeopardy jurisprudence, as applied to sentencing.

Under the applicable statute, 21 U.S.C. § 853, the court may only order a criminal forfeiture "in imposing sentence ...."[9] See Libretti v. United States, 516 U.S. 29, 38-39 (1995) ("Forfeiture is an element of the sentence imposed following conviction ....") (emphasis deleted). Any criminal forfeiture is part of the judgment of sentence and is to be imposed at the time of sentencing. See Fed.R.Crim.P. 32(d)(2) (1996 rev.) ("At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment").[10] When

---

[9] See Statute and Rule Involved, above.

[10] At the time of petitioner's sentencing, in July 1991, the Rule read differently, see Statute and Rule Involved, above, but the 1996 Advisory Committee Note makes clear that the revised language was, in this respect, intended only to clarify existing practice as it had stood since 1972: "A provision for including a verdict of criminal forfeiture as part of the sentence was added in 1972 .... Since then, the rule has been interpreted to mean that any forfeiture order is a part of the judgment of conviction and cannot be entered before sentencing."

judgment was entered in petitioner's case, and the government's time to appeal expired 30 days later, see 18 U.S.C. § 3731, this criminal proceeding ended. Berman v. United States, 302 U.S. 211 (1937).

Thus, the entry of petitioner Heilbrunn's criminal forfeiture, which did not occur at sentencing but rather an entire year afterward, and was not included in the Judgment but in a separate order, was by all legal and objective tests a "separate proceeding" for Double Jeopardy purposes.[11] Moreover, at that time, he had embarked upon service of his prison sentence and was not called back for imposition of the forfeiture in his presence. See In re Bradley, 318 U.S. 50 (1943) (defendant, held in criminal contempt of the court of appeals, was illegally sentenced to both fine and imprisonment; when he paid fine two days after commencing confinement, court attempted to rescind fine order, remit payment, and enforce imprisonment; violation found).[12] Petitioner's sentence was not rendered illegal by the absence of a criminal forfeiture component. Compare Bozza v. United States, 330 U.S. 160, 166-67 (1947) (no Double Jeopardy violation when

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[11] The concurring opinion in Hudson appears to equate a second, separate proceeding, for these purposes, with a "successive prosecution." 139 L.Ed.2d at 463. The majority does not make this equation, which is plainly inconsistent with Ex parte Lange, supra, and In re Bradley, infra.

[12] In Bradley, while defending the district court's attempted change in the defendant's sentence, the Solicitor General nevertheless confessed in this Court that the change could not be made outside the presence of the defendant. See 318 U.S. at 53 (Stone, Ch.J., dissenting).

sentence was corrected in defendant's presence, within hours of its imposition, before defendant had been transported from Marshal's custody to prison, by adding minimum mandatory $100 fine). For all these reasons, the subsequent addition to his sentence violated the Double Jeopardy Clause.

As the four-Justice dissent explained in Jones v. Thomas, and not doubted by the majority:

> It is clear from [United States v. DiFrancesco, 449 U.S. 117 (1980),] and [Pennsylvania v. Goldhammer, 474 U.S. 28 (1985) (per curiam),] that when a sentence is increased in a second proceeding 'the application of the double jeopardy clause ... turns on the extent and legitimacy of a defendant's expectation of finality in that sentence. If a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited ....'

491 U.S. at 394 (Scalia, J., dissenting) (ellipses original; internal citation omitted). The Court has thus viewed a resentencing on remand, after the government's statutorily-authorized sentencing appeal (as in DiFrancesco) or after the defendant's (as in Goldhammer), as a "second proceeding," even though the appeal had lawfully prevented the judgment of sentence from becoming final, so that the defendant had no "legitimate expectation of finality."

That the sentence alteration occurred in the same case cannot, for these purposes, suffice to make it part of the same "proceeding." A fortiori here, where the judgment had become final, and the entry of the forfeiture order a year after sentencing violated every applic-

able statute and rule, the sentence increase surely occurred in a separate, second, and successive "proceeding" within the meaning of this doctrine, thus unconstitutionally placing petitioner "in jeopardy" of punishment a second time for the same offense.

Sentencing went forward in this case without the promised forfeiture agreement, and no forfeiture was made part of the judgment at sentencing, nor even by the time the judgment was formally entered three weeks thereafter. The judgment became final 30 days later upon the expiration of the government's time to appeal. See 18 U.S.C. § 3731; Fed.R.App.P. 4(b). No later than that point, petitioner Heilbrunn was legitimately entitled to the expectation, based upon his plea agreement and the fact of entry of judgment, that his sentence would never contain a criminal forfeiture penalty.[13]

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[13] Petitioner did not waive this claim by his counsel's silence when the prosecutor asked the district court to await submission of the forfeiture addendum before entering the judgment (to which the court did not respond), even though the sentencing hearing went forward without the addendum's being ready, contrary to the literal provisions of the plea agreement. Any implied consent expired three weeks later when judgment was entered. Double jeopardy protection is not waived even by a voluntary and counseled guilty plea, where the violation, as here, is plain on the face of the record and needs no factual development. United States v. Broce, 488 U.S. 563 (1989), explaining Menna v. New York, 423 U.S. 61 (1975) (per curiam). Nor would the defendant's consent, either express or implied, render legal what would otherwise be an illegal or even unconstitutional sentence. See Libretti, 133 L.Ed.2d at 293-94 (Stevens, J., dissenting). Moreover, this kind of violation has long been recognized as cognizable in a habeas corpus proceeding. See, e.g., Ex parte Lange, supra.

Even if petitioner Heilbrunn was not definitively entitled to relief from the added punishment of forfeiture for the reasons just discussed, a reasonable jurist, studying the law of double jeopardy as developed in this Court, could at least have thought he was. There was thus a "substantial constitutional question" present in his case that required issuance of a certificate of appealability under 28 U.S.C. § 2253(c). Certiorari should also be granted to confirm that the substantive standard for issuance of a certificate of appealability to a § 2255 petitioner is no higher than that articulated by this Court in Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983), for certificates of probable cause in habeas corpus cases under prior law: whether the case presents an issue that is at least "debatable among jurists of reason," that "a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" (internal citations omitted).[14]

There is another reason why certiorari should be granted. In Monge v. California, 524 U.S. --, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998), this Court held that the Double Jeopardy Clause does not bar an appellate court from giving the prosecution a second opportunity, outside the capital sentencing context, to prove a sentencing enhancement that the trial court wrongly held was shown by sufficient evidence at the original sentencing. The Court thus held that the Double Jeopardy principle established in Burks v. United States, 437 U.S. 1 (1978) -- that the prosecution must not be allowed a second

[14] Alternatively, the Court might consider a grant of certiorari coupled with a summary reversal and remand on this COA point.

chance to establish an offense if an appellate court finds there was insufficient evidence at the first trial to prove one or more of the elements -- has no application to noncapital sentencing. Compare Bullington v. Missouri, 451 U.S. 430 (1981) (Burks principle does prevent second attempt to establish aggravators necessary to impose capital punishment).

Although the Burks principle is not the only way in which the protections of the Double Jeopardy Clause are implemented, the majority in Monge asserted broadly that "the Double Jeopardy Clause [does not] exten[d] to noncapital sentencing proceedings." 141 L.Ed.2d at 621. This assertion cannot have been intended to be taken literally. The instant case presents an illustration of a double jeopardy principle that does apply to noncapital sentencing, as this Court has long held, in a line of cases extending from Lange to Hudson, but not mentioned in Monge.[15] Certiorari should therefore be granted to clarify and limit the overbroad language of Monge, and to prevent confusion and misunderstanding among practitioners and lower courts.

For all these reasons, this Court should issue a writ of certiorari to review the final Order of the court of appeals denying a certificate of appealability from the district court's determination that the criminal forfeiture in this case was part of the same proceeding as the underlying criminal case, and therefore did not violate the Double Jeopardy Clause.

[15] The majority opinion in Monge was authored by Justice O'Connor, who also wrote the Court's 1995 opinion in Witte, which clearly reaffirmed the Lange principle.

CONCLUSION

For the foregoing reasons, petitioner PAUL B. HEILBRUNN prays that this Court grant his petition for a writ of certiorari to review the final Order of the United States Court of Appeals for the Seventh Circuit denying a certificate of appealability to appeal the denial of relief under 28 U.S.C. § 2255.

Respectfully submitted,
LAW OFFICES OF ALAN ELLIS

By: PETER GOLDBERGER
Counsel of Record
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 658-2255

Attorneys for Petitioner

January 18, 1999.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit *ml*
Chicago, Illinois 60604

August 21,1998
Submitted: August 19,1998

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

PAUL B. HEILBRUNN, Petitioner-Appellant,	] Appeal from the United States District Court for the Southern District of
No. 98-2310 v.	] Indiana.
	] No.
UNITED STATES OF AMERICA,	] IP 97-617-C-M/S
Respondent-Appellee.	] Larry J. McKinney,
	] Judge.

Petitioner filed a motion to vacate, correct, or set aside a sentence pursuant to 28 U.S.C. § 2255. The district court denied the motion and dismissed the action with prejudice, and subsequently denied petitioner's application for a certificate of appealability. *See* Fed. R. App. P. 22(b); Cir. R. 22.1.

This court has reviewed the final order of the district court from which petitioner appeals, and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Accordingly, the application for a certificate of appealability is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	No.
vs.	)	IP 97-617-C-M/S
	)	IP 87-105-CR-01-M/S
PAUL HEILBRUNN,	)	
	)	
Defendant.	)	

ENTRY DENYING MOTION TO VACATE OR SET ASIDE CONVICTION AND DIRECTING ENTRY OF JUDGMENT

This cause is before the court on the defendant's motion pursuant to his 28 U.S.C. § 2255, on the United States' response, on the defendant's reply and on the expanded record.

The court, having read and examined such pleadings and record, and being duly advised, now finds that the defendant's motion must be denied and this action dismissed. This conclusion rests on the following facts and circumstances.

1. Defendant Heilbrunn was charged with drug and related offenses, including engaging in a continuing criminal enterprise, in an indictment returned in this

District on November 20, 1987. Heilbrunn engaged the services of attorney J. Richard Kiefer ("Kiefer") to represent him in the matter. The charges against Heilbrunn were resolved through the submission and acceptance of a written plea agreement. Heilbrunn pled guilty to two counts of possession of marijuana with intent to distribute, three counts of interstate travel in aid of racketeering and one count of engaging in a continuing criminal enterprise. Heilbrunn was sentenced in accord with the plea agreement and the remaining charges against him in this District and a charge against him in the Northern District of Indiana were dismissed. No direct appeal from this disposition was taken.

2. Heilbrunn now brings the present action, pursuant to 28 U.S.C. § 2255, arguing that (a) he was denied the effective assistance of counsel, (b) the United States engaged in bad-faith plea bargaining, (c) the criminal forfeiture which resulted from the guilty plea violated the plea agreement and was a violation of the constitutional prohibition against double jeopardy, (d) there was a violation of Rule 11(c)(1) of the Federal Rules of Criminal Procedure, and (e) the grand jury indictment in his case was defective.

3. Habeas corpus relief under 28 U.S.C. § 2255 is limited to an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice. *Borre v. United States*, 940 F.2d 215, 217 (7th Cir. 1991).

4. Heilbrunn was the organizer and leader of a large-scale marijuana importation enterprise. Certain facets of

Heilbrunn's offenses were described in *United States v. Auerbach*, 913 F.2d 407 (7th Cir. 1990), which was an appeal involving two of Heilbrunn's co-defendants.

5. The overarching principle which is applicable to the challenge in this case is the requirement of due process which requires that, to be valid, a guilty plea must be both "voluntary" and "intelligent." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). *See also Parke v. Raley*, 113 S. Ct. 517, 523 (1992); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) ("The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant").

6. Heilbrunn makes the ubiquitous claim that he was denied the effective assistance of counsel.

a. A criminal defendant has a right to effective assistance of counsel in deciding whether to accept or reject a proposed plea agreement. *Johnson v. Duckworth*, 793 F.2d 898, 900-02 (7th Cir.), *cert. denied*, 479 U.S. 937, 107 S. Ct. 416 (1986). The standard adopted in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), is equally applicable to guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985).

b. In order to show ineffective assistance of counsel, Heilbrunn must establish that Kiefer committed errors so serious that his performance fell below an objective standard of reasonableness, and that Kiefer's deficient performance prejudiced Heilbrunn by causing an unreliable result at trial,

or a fundamentally unfair proceeding. *Lockhart v. Fretwell*, 113 S. Ct. 838, 844 (1993), citing *Strickland*, 466 U.S. at 687. A defendant's failure to satisfy either prong is fatal to his claim. *Ebbole v. United States*, 8 F.3d 530, 534 (7th Cir. 1993), *cert. denied*, 510 U.S. 1182, 114 S. Ct. 1229 (1994).

c. In the guilty plea context, as recently explained by *Harvey v. McCaughtry*, 11 F.3d 591 (7th Cir. 1993), the first part of the *Strickland* test (deficient performance) remains the same. "A person who attempts to satisfy the second, or 'prejudice,' prong of the test, however, 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Harvey*, 11 F.3d at 693, quoting *Hill v. Lockhart*, 474 U.S. at 59.

d. Although Heilbrunn offers various specifications in support of his ineffective assistance of counsel claim, none warrant relief. Kiefer's representation of Heilbrunn was vigorous, informed and singularly effective in light of Heilbrunn's serious--and even likely--exposure to a life sentence. Heilbrunn's arguments concerning Kiefer's lack of investigation or preparation are based on isolated and self-serving circumstances which do not suggest that Heilbrunn was deprived of a viable defense, nor of a more advantageous sentencing structure, nor in any way of the fundamentally fair proceedings to which he was entitled.

e. It has been explained in *Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir. 1997), that:

> [t]he question posed by *Strickland* [is] whether, taking all of the proceedings into account, counsel made "the adversarial testing process work in the particular case." [*Strickland*,] 466 U.S. at 690. Counsel must contest the prosecution's case and advance a good defense; if that role has been fulfilled, a writ of habeas corpus should not issue. *See Burris v. Parke*, 116 F.3d 256 (7th Cir. 1997).

Kiefer's representation of Heilbrunn more than satisfied this standard.

7. Heilbrunn's second claim is that the United States did not bargain with him in good faith. This claim concerns the sentence which the United States "demanded" of Heilbrunn in relation to the sentence which one of Heilbrunn's co-defendant's had received and what modification would be sought or agreed to by the United States. This claim lacks any discernible foundation in due process, for all that occurred was that Heilbrunn and the United States negotiated a sentencing structure. This was mutually agreed to by the parties. What Heilbrunn now takes umbrage at is the United States' reasoning process in holding that Heilbrunn receive a certain minimum executed term in his case. That process involved classic considerations by prosecutors--it did not involve any impermissible consideration or actual coercion--and hence the scrutiny which Heilbrunn seeks now to bring to that process fails to illuminate any violation of his rights.

8. The plea agreement entered into between Heilbrunn and the United States contemplated the forfeiture of certain of Heilbrunn's assets. The particulars of this forfeiture were not established and acted on by the court until several months after the sentencing. At that time, however, an amended judgment of conviction was entered. Heilbrunn's argument that the post-sentencing forfeiture violated the constitutional prohibition against double jeopardy is without merit because, though separated in time, the forfeiture was part of the same proceeding and was merely one aspect in which the plea agreement was fulfilled. Heilbrunn knew without doubt that the forfeiture would be finalized, and nothing more than that occurred.

9. Heilbrunn next contends that he was misadvised or incompletely advised concerning the sentence he could have received. The court does not find there to be substantial basis for this claim, but the alleged error in any event does not suggest the type of fundamental error for which § 2255 is reserved.

10. Heilbrunn's claim that the special grand jury responsible for his indictment was not properly constituted has been refuted by the United States, and Heilbrunn does not contend otherwise.

11. On the basis of the foregoing, therefore, the defendant's motion for relief pursuant to 28 U.S.C. § 2255 must be denied. Although Heilbrunn seeks an evidentiary hearing on his claims, "[a] district judge need not grant an evidentiary hearing in all § 2255 cases. Such

a hearing is not required if such a hearing is not required if [sic] 'the record standing alone conclusively demonstrates that a petitioner is entitled to no relief.'" *Daniels v. United States*, 54 F.3d 290, 293 (7th Cir. 1995) (quoting *Humphrey v. United States*, 896 F.2d 1066, 1070 (7th Cir.), *cert. denied*, 498 U.S. 938 (1990)). That is the case here. Judgment consistent with this Entry shall now issue. The costs of this action are assessed against the defendant.

IT IS SO ORDERED.

s/Larry McKinney
LARRY J. McKINNEY, Judge
United States District Court

Date: 12/31/97

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	No.
vs.	)	IP 97-617-C-M/S
	)	IP 87-105-CR-01-M/S
PAUL HEILBRUNN,	)	
	)	
Defendant.	)	

JUDGMENT

The court, having this day made its Entry,

IT IS NOW THEREFORE ADJUDGED AND DECREED that the defendant take nothing by his motion for relief pursuant to 28 U.S.C. § 2255, and this cause of action is **DISMISSED WITH PREJUDICE.**

The costs of this action are assessed against the defendant.

s/Larry McKinney
LARRY J. McKINNEY, Judge
United States District Court

Date: 12/31/97

Copies to:

Alan Ellis
50 Rittenhouse Place
Ardmore, PA 19003-2276

Tim Morrison
Office of the United States Attorney
United States Courthouse - 5th Floor
46 East Ohio Street
Indianapolis, IN 46204

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	CAUSE NO.
V.	)	IP 97-0617-C
	)	CAUSE NO.
PAUL B. HEILBRUNN,	)	IP 87-105-CR-01
Defendant.	)	

ORDER

This cause comes before the Court on defendant's MOTION FOR LIMITED RECONSIDERATION OF ENTRY DENYING MOTION TO VACATE CONVICTION AND SENTENCE.

And the Court, having examined said pleading and being fully advised in the premises, now OVERRULES said Motion.

IT IS SO ORDERED this 21st day of January, 1998.

s/Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution to:

Timothy M. Morrison, Assistant United States Attorney
OFFICE OF THE UNITED STATES ATTORNEY
Fifth Floor, United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	No.
vs.	)	IP 97-617-C-M/S
	)	IP 87-105-CR-01-M/S
PAUL HEILBRUNN,	)	
	)	
Defendant.	)	

ENTRY

The defendant's request for the issuance of a certificate of appealability is **denied**. The reason for this is the court finding that there is no sound basis on which to conclude that the defendant will be able to make a substantial showing of the denial of a constitutional right in connection with his appeal. 28 U.S.C. § 2253.

IT IS SO ORDERED.

s/Larry McKinney
LARRY J. McKINNEY, Judge
United States District Court

Date: 5/5/98

Copies to:

Alan Ellis
50 Rittenhouse Place
Ardmore, PA 19003-2276

Tim Morrison
Office of the United States Attorney
United States Courthouse - 5th Floor
46 East Ohio Street
Indianapolis, IN 46204